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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Thomas Rigging Company, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision

and decree of the United States Court of Appeals for the Ninth Circuit, rendered on March 10, 1954, modifying and enforcing the order of the National Labor Relations Board against petitioner herein.

OPINIONS BELOW.

The decision and order of the National Labor Relations Board is reported in 102 NLRB No. 1, and is also printed in the record (R. 70-83).

The opinion and decree of the United States Court of Appeals for the Ninth Circuit is reported in 211 F. (2d) 153, and is also set forth in the appendix and record herein (R. 336; Appendix, *infra*, pp. 1-9).

JURISDICTION.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254 (1) and by 29 U.S.C. § 160 (e).

The opinion of the Court of Appeals was filed March 10, 1954. On June 8, 1954, a petition for a rehearing was denied by the Court below (R. 372).

An order was made by the Court of Appeals staying the mandate pending the filing of this petition for certiorari.

QUESTIONS PRESENTED.

The National Labor Relations Board determined that petitioner had refused to hire members of the Machinists Association in consequence of an unlawful arrangement which petitioner had with the Carpenters Union, whereby only members of the latter Union would be hired.

On petition of the Board for enforcement of its order, the Court of Appeals found there was no arrangement between petitioner and the Carpenters. The Court denied enforcement against the Union, but then, making its own factual finding that petitioner solely by unilateral action had discriminated in favor of the Carpenters Union, enforced the Board's order against petitioner.

The questions presented are:

1. Whether the Court below, in an enforcement proceeding by the Board, can reject the Board's findings, make its own findings of fact, and contrary to the petition and prayer of the Board, dismiss as to one co-defendant and enforce the Board's order against the other.

2. Whether the Court below in rejecting the Board's findings of fact and making its own findings of fact is in error in exercising an administrative rather than a judicial function.

3. Whether the jurisdiction of the National Labor Relations Board can be asserted over a subcontractor twice removed from interstate commerce.

4. Whether the Court below may disregard the status and business relationships between independent contractors in reviewing the Board's exercise of jurisdiction.

STATUTE INVOLVED.

The pertinent provisions of the Act (61 Stat. 136, 29 U.S.C. § 141 et seq.) are set forth in the Appendix, *infra,* pp. 15 to 17).

STATEMENT.

On October 24, 1951, the International Association of Machinists filed unfair labor practice charges against petitioner Thomas Rigging Company, the Carpenters Union, Local No. 642, A.F.L., and Harry Cecil, business agent of the local. The charge stated that the Company required clearance from the Union as a condition of employment (R. 1-4), and that the Union caused the Company to discriminate against the several individual machinists (R. 4-7).

The Board, through its Regional Director for the Twentieth Region, on March 6, 1952, issued and served a complaint upon the Company, the Union and Cecil, alleging that the violations of the Act were committed at the San Pablo plant of Rheem Manufacturing Company, on August 8, 13, and 16, and September 4, 1951 (R. 8-15).

Thomas Rigging Company is a California corporation at Emeryville, California, engaged in rigging

and setting up machinery (R. 269). The Company handles no purchases or sales of goods or equipment, either intrastate or interstate. None of the services rendered by petitioner are in interstate commerce (R. 111-112, 95-101).

Rheem, the prime contractor, had a federal government contract for the manufacture of 81 millimeter mortar shells. After competitive bidding, Christensen & Lyons was awarded by Rheem the contract for the installation of the machinery for the mortar shell line (R. 120-121), and thereafter proceeded to install the equipment, which was owned by the United States government (R. 127). In the process of installation, subcontracts were granted (R. 127). Pursuant to a subcontract with Christensen & Lyons, petitioner began work at the Rheem San Pablo plant on or about August 1, 1951, (R. 108; Appendix, *infra*, p. 19). Actual production at the plant did not start until late in November, 1951, after petitioner's subcontract had been substantially completed (R. 123).

Because of the extremely dangerous work of the Company, it hired millwrights and riggers principally through personal contracts,[1] (R. 279-281).

The Machinists claimed that in order to be hired by the Company, membership in and clearance by the Carpenters Union was required (R. 128-149, 151-159, 259-261, 168-179, 196-204). Petitioner showed that it had no occasion to inquire whether millwrights

[1]For table showing relative hazards of employment, see Appendix, *infra*, p. 21. See Appendix, *infra*, p. 22, illustrating dates of employment, prior services, and personal references, of millwrights at the Rheem job.

hired by it were members of any particular labor organization (R. 351, 353); members of the Machinists Association were on the payroll of the Company, and had been hired to perform millwright work (R. 278, 281, 333-334) and that no clearances from the Carpenters Union were at any time presented to the Company, (R. 375-376, 222, 225, 265-266).

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1. THE TRIAL EXAMINER'S INTERMEDIATE REPORT.

Disregarding the subcontract between Christensen & Lyons and petitioner, the Trial Examiner determined that the Company's operations affected commerce and that the Board properly asserted jurisdiction (R. 23, 27, June 12, 1952). The Examiner reasoned that since the Company was engaged in the installation of machinery to be used by Rheem, petitioner was furnishing services to Rheem (R. 24-26).[2] The Examiner further found that an unlawful hiring arrangement existed between the Company and the Union, requiring clearance by the Union (R. 40, 41, 47), and that the Union caused petitioner to encourage membership in the Carpenters Union and discourage it in the Machinists Association (R. 51).

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[2]The Trial Examiner relied on the following cases to support the extension of the Board's jurisdiction to the Company as a subcontractor: *Ozark Dam Constructors v. National Labor Relations Bd.* (C.A. 8th), 190 F. (2d) 222; *Local Union No. 50, etc.*, 98 NLRB No. 209; *Westport Moving & Storage Co.*, 91 NLRB 902; *Hollow Tree Lumber Co.*, 91 NLRB 635 (R. 26-27).

2. THE BOARD'S DECISION.

In its decision of January 8, 1953, the Board did not pass upon the matter of jurisdiction over a subcontractor, although this issue was argued extensively in the Company's exceptions and brief before the Board (R. 65-66, 71).

The Board agreed with the Trial Examiner that "an understanding existed" between the Company and the Carpenters "that no employee would be hired without a clearance" from the Union (R. 73-74). The Board also held the Carpenters Union

> "* * * responsible for the discriminatory hiring arrangement, and therefore, in our opinion, responsible for its reasonably to be anticipated results. Consequently, we reach the conclusions, as did the Trial Examiner, that the Respondent Union and Respondent Cecil *caused* the Respondent Company to discriminate against Gonzalves, Renner, Young and Glen, * * *" (R. 75). (Emphasis added.)

The Company and the Union were ordered jointly to make whole any loss of pay to the complaining Machinists (R. 77-81).

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3. THE DECISION IN THE COURT OF APPEALS.

The Court below enforced the Board's order against the Company, but denied enforcement against the Union, in an opinion issued March 10, 1954 (Appendix, *infra*, pp. 1 to 9).

The jurisdiction of the Board was sustained on two grounds: (1) petitioner furnished services in excess of $50,000 per annum *to Rheem,* a company producing goods destined for out-of-state shipment valued in excess of $25,000 per year;[3] and (2) petitioner performed vital services *to a company* engaged in the production of goods for national defense.[4] The fact that petitioner was a subcontractor, responsible to Christensen & Lyons, and did not have a contract with Rheem, was held to require no different result (Appendix, *infra,* pp. 3, 4).

Because there was no proof of an arrangement existing between petitioner and the Union, enforcement of the Board's order against the Union and Cecil was denied. In holding that the order should be enforced against petitioner, the Court below said:

> "Many reasons may have motivated the Company in its discriminatory hiring policy and it is *not improbable* that it voluntarily chose to do so on a unilateral basis." (Emphasis added.) (Appendix, *infra,* pp. 8, 9.)

In its petition for rehearing, petitioner maintained that since the Court found that no arrangement existed, the Court of Appeals either should deny enforcement of the Board's order against petitioner, or remand the matter to the Board for a determination regarding the Company's unilateral discrimination. This petition was denied (R. 372).

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[3] *Hollow Tree Lumber Co.,* 91 NLRB 635.

[4] *Westport Moving & Storage Co.,* 91 NLRB 902.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In rejecting the Board's findings, making its own findings of fact, and contrary to the enforcement petition, denying enforcement as to one co-defendant, and enforcing against the other.

2. In failing to remand the matter to the Board, after rejecting the Board's findings of fact.

3. In exercising administrative rather than judicial functions in rejecting the Board's findings of fact, and making its own.

4. In extending the jurisdiction of the Board to a subcontractor twice removed from interstate commerce.

5. In disregarding the status and business relationships between independent contractors, when reviewing the Board's exercise of jurisdiction.

6. In relying on the *Hollow Tree Lumber Company*[3] and *Westport Moving and Storage Company*[4] cases as "established grounds" for the Board's jurisdiction herein.

7. In refusing to recognize the Board's rule that the *Hollow Tree* and *Westport Moving* standards do not apply to subcontractors.

8. In enforcing the Board's order against the Company, where there is no substantial evidence on the record considered as a whole to show Company discrimination as found by the Board.

9. In condemning petitioner's hiring practices which were in accord with Board-approved procedures.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals rejected the Board's findings of fact, and made its own findings to sustain its enforcement of the Board's order against petitioner. Such action conflicts with the decisions of this Court relating to judicial review of administrative decisions and the remand procedure.

The complaint against petitioner was that it and the Union *had agreed* to enforce a policy requiring clearance by and membership in the Union, and that the Carpenters had *caused* the Company to discriminate against the Machinists (R. 21-22).

The Trial Examiner found that the Union *caused* the Company to discriminate against the Machinists (R. 49-50).

The National Labor Relations Board likewise concluded that the Union *caused* petitioner to discriminate against the charging Machinists (R. 75). In seeking enforcement of the Board's order, the General Counsel relied on the Board's finding that an arrangement existed requiring clearance from the Union, and that the Machinists were denied employment *as a direct result* of this device (R. 73-75).

The Court of Appeals recognized the basis of the Board's findings and order in the second paragraph of its opinion (Appendix, *infra,* p. 2). Notwithstanding, it reversed both the Trial Examiner and the Board. The Court found that though no arrangement existed between the Company and the Union, nevertheless it was "not improbable" that the Company

voluntarily chose to act in this manner on a purely unilateral basis. This, it held, was so, even though no millwright was a member of the Carpenters Union, and no clearance for millwrights had been issued by the Carpenters Union (Appendix, *infra*, p. 9).

The principle of judicial review is that the function of the reviewing Court ends when an error of law is laid bare. *Federal Power Com. v. Idaho Power Co.*, 344 U.S. 17, 20. At that juncture the matter must go back to the administrative agency for reconsideration. The Trial Examiner and the Board at all times proceeded on the theory that petitioner and the Union were *in pari delicto*. There was no objection made before the Board that the Company discriminated solely on a unilateral basis. For the Court below to so find is clearly beyond the authority granted in Section 10(e) of the Act.[5] The authority to enforce is not power to exercise an administrative function. *Federal Power Com. v. Idaho Power Co.*, 344 U.S. at 21; *Ford Motor Co. v. National Labor Relations Board*, 305 U.S. 364, 372-374. The Court of Appeals disregarded the principle reiterated many times by this Court that where Congress has reposed primary jurisdiction to make a policy or factual determination in an administrative agency, the Courts will stay their hands until the agency endowed with its particular experience has had an opportunity to act.[6]

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[5] 29 U.S.C. §160(e), Appendix, *infra*, p. 17.

[6] *Federal Trade Com. v. Morton Salt Co.*, 334 U.S. 37, 55; *Siegel Co. v. Federal Trade Com.*, 327 U.S. 608, 612-614; *Addison v. Holly Hill Co.*, 322 U.S. 607, 618-619; *Ford Motor Co. v. National Labor Relations Bd.*, 305 U.S. 364, 372-374; *Federal Com-*

The unilateral discrimination by petitioner was a matter which the Board had not considered, "but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine". *Federal Trade Com. v. Regal Milling Co.*, 288 U.S. 212, 218. If Congress had intended to establish the Court of Appeals as "a superior and revising agency in the administrative field", then "its decision was not a judicial judgment reviewable" by the Supreme Court. *Federal Radio Com. v. Nelson Bros. Co.*, 289 U.S. 266, 274; *Federal Radio Com. v. General Electric Co.*, 281 U.S. 464. But Congress obviously had no such intention, since Section 10(e) specifically provides that the decree of the reviewing Court shall be subject to review "by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of Title 28".[7]

Where the reviewing Court disagrees with administrative action, the result should be a remand. The Court should not, in the first instance, exercise the administrative agency's function. *Ford Motor Co. v. National Labor Relations Bd.*, 305 U.S. 364, 373; *Federal Power Com. v. Idaho Power Co.*, 344 U.S. 17, 20-21; *Federal Trade Com. v. Regal Milling Co.*, 288

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munications Com. v. Pottsville Broadcasting Co., 309 U.S. 134, 145. See Section 10(c) of the *Labor Management Relations Act*, 29 U.S.C. § 160(c), Appendix, *infra*, p. 15).

[7] 29 U.S.C. § 160(e). Other provisions of Section 10(e), relating to the conclusiveness of the Board's findings of fact, "if support by substantial evidence on the record considered as a whole", and to procedure for taking additional evidence, clearly contemplate the traditional relationship between the administrative agency and the reviewing court.

U.S. 212; and see cases cited, *supra*, note 6. By its enforcement of the Board's order against petitioner, based on its own findings of fact, the Court below plainly contravened established standards of judicial review.

2. To justify the Board's jurisdiction herein, the Court below disregarded the status of petitioner as a subcontractor, whose business relations were solely with Christensen & Lyons (Appendix, *infra*, pp. 3, 19). This conflicts with the decision of this Court in *National Labor Relations Board v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689, where the following was said about respecting contractual relations:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, *did not eliminate the status of each as an independent contractor*, or make the employees of one the employees of the other. *The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.*" (Emphasis added.)

Moreover, the holding of the Court of Appeals concerning the Board's jurisdiction over subcontractors, is directly contrary to the decisions of the Board itself. The decisions applicable to this issue are clear and may be summarized as follows:

(a) *Brooks Wood Products*, 107 NLRB No. 71: It would not effectuate the policies of the Act for

jurisdiction to be asserted where the services of the subcontractor employer are twice removed from interstate commerce and where the employer's business was all intrastate.[8]

(b) *Casey Welding Works,* 107 NLRB No. 185. The policies of the Act would not be effectuated by asserting jurisdiction over an employer which, as a subcontractor, performed services in the erection of an airport administration building, at an airport used by both a national airline and the United States Air Force, and a television station. The Board said:

> "We find that the airport and television station are instrumentalities and channels of interstate commerce.
>
> "However the Employer contends that the value of the Employer's subcontracts on these two construction projects may not be used in determining whether the Board has jurisdiction over this case because the contractors in each instance are not, themselves, engaged in interstate commerce. *We find merit in this contention.* It is clear that the Employer's services as a subcontractor for the projects are *twice removed from interstate commerce.* Accordingly, as the Board has recently stated,[8] to count the value of these services in determining whether the employer meets the Board's jurisdictional standards enunci-

[8] *Brooks Wood Products,* 107 NLRB No. 71.

[8] In the second footnote of its decision, the Board stated: "However we do *not* hereby adopt the Board's ruling in that case (Hollow Tree Lumber Co., 91 NLRB 635) as a permanent policy." 107 NLRB No. 71, n. 2.

ated in the *Hollow Tree Lumber Company*[4] decision *would be an unwarranted extension of that doctrine.*"

"For the same reason, we believe that the Employer's services as a subcontractor in the erection of the administration building do *not* substantially affect the national defense effort within the meaning of the rule laid down in the *Westport Moving and Storage* case."[5] (Emphasis added.)

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[4]91 NLRB 635. However we do *not* hereby adopt the Board's ruling in that case as a permanent policy.

[5]91 NLRB 902.

The dissenting Board member took the position that the Board should disregard existing legal or financial arrangements, and cited the instant case to support his contention.[9] It is obvious that the view of the dissenting member was rejected by the majority of the Board. Hence, the holding of the Court below is diametrically opposed to the criteria established by the Board itself.

(c) *Atkinson Electrical Co., Inc.*, 108 NLRB No. 105. The Board further emphasized that the *Hollow Tree Lumber Company* and *Westport Moving and Storage Co.* standards were not applicable to subcontractors.[10]

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[9]"Their (the majority of the entire Board) decision ignores the fact that the impact of the Employer's operations on interstate commerce, realistically appraised, clearly brings the Employer within the limits of the Hollow Tree standards.[8]

[[8]See Thomas Rigging Company, 102 NLRB 1.]"

[10]"It is clear that the Employer's services as a subcontractor at the Port of Seattle and U. S. Army installation projects were twice removed from interstate commerce and therefore *may not be*

The foregoing decisions clearly indicate the standards governing the Board's jurisdiction over subcontractors. They amply illustrate that the grounds relied on by the Court below to substantiate its holdings are no longer the correct rules for determining jurisdiction.[11]

The status of petitioner as a subcontractor dealing solely with Christensen & Lyons cannot be disregarded in determining the propriety of the Board's exercise of jurisdiction. See *Kansas City Structural Steel Company v. State of Arkansas,* 269 U.S. 148, 151; *Illinois Surety Co. v. John Davis Co.,* 244 U.S. 376; *Barton v. McDonald,* 81 Cal. 265, 267; *Kircher v. Hunter,* 101 Cal. App. 548, 551. This is emphasized by the fact that the work of petitioner would be completed before the Rheem plant began its operations, which operations might be held to be a part of interstate commerce.

3. The hiring practice of petitioner as found by the Court below, was in accord with established policies approved by the Board and the Courts. It is a common practice, approved by the Board, for superintendents in recruiting millwrights, to rely on recom-

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counted in deciding whether to assert jurisdiction under the Hollow Tree formula, *Hollow Tree Lumber Co.,* 91 NLRB 635; see *Casey Welding Works,* 107 NLRB No. 185. For the same reason, we believe that the Employer's services as a subcontractor on two U.S. Army installations do not substantially affect the national defense. *Casey Welding Works, supra.*"

[11]The Board has changed the standards by which its jurisdiction is asserted over employer. The measurements relied on by the Court below are no longer in effect. See Appendix, *infra,* pp. 23 to 27, where the old and new standards are set forth.

mendations from other millwrights already on the job, or to take men the superintendent had worked with before. *The M. W. Kellogg Company,* 94 NLRB No. 74. Likewise, hiring of employees done only through a particular union's offices, absent evidence of unlawful union discrimination, does not violate the Act. *Del. E. Webb Const. Co. v. National Labor Relations Bd.* (C.A. 8th), 196 F. (2d) 841, 845; *Hunkin-Conkey Construction Co.,* 95 NLRB 433, 434. The decision of the Court below is in conflict with the foregoing cases.

4. The Court below was in conflict with this Court when it enforced the Board's order because of a "not improbable" finding of fact. The reasoning of the Court below completely negatives the presumption against wrongdoing, which is the essence of our law. Speculation cannot be substituted for proof. *Galloway v. United States,* 319 U.S. 372, 387; *Myers v. Reading Co.,* 331 U.S. 447, 485. A finding must have more substantial foundation than mere intuition. See *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 488.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
September 3, 1954.

Respectfully submitted,
ALLAN L. SAPIRO,
DOUGLAS A. NYE,
Counsel for Petitioner.

(Appendices A, B, C, D, E and F Follow.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Thomas Rigging Company and Carpenters Union, Local No. 642, United Brotherhood of Carpenters & Joiners of America, A.F.L., and Harry Cecil, Business Agent of Respondent Union, Respondents.	No. 13,838 Mar. 10, 1954

Petition for Enforcement of Order of the National Labor Relations Board

Before: Healy, Orr and Pope, Circuit Judges.

Orr, Circuit Judge:

National Labor Relations Board, hereafter the Board, petitions for enforcement of its order requiring respondents Thomas Rigging Company, hereafter the Company, the Carpenters Union, Local No. 642, United Brotherhood of Carpenters & Joiners of America, A.F.L., hereafter the Millwrights, and Harry Cecil, its business agent, to cease and desist from certain unfair labor practices and to take specified affirmative action.

The Board found that the Company was engaged in commerce within the meaning of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., hereafter the Act, and found that the Company violated § 8(a)(1) and (3) thereof by refusing to hire four members of the International Association of Machinists, hereafter the Machinists, because of an alleged unlawful agreement between the Company and the Millwrights that no employee would be hired unless he were a member of the Millwrights. The Board also found that the Millwrights violated § 8(b)(1)(A) and § 8(b)(2) of the Act by being a party to the unlawful agreement and causing the Company to engage in the discriminatory conduct.

Three questions are presented: 1. Did the Board properly assert jurisdiction over the alleged unfair labor practice here involved? 2. Is there substantial evidence in the record considered as a whole to support the Board's finding that respondent company discriminated against members of the Machinists in violation of § 8(a)(1) and (3) of the Act? 3. Is there substantial evidence in the record considered as a whole to support the Board's finding that the Millwrights and its business agent Cecil caused the Company to discriminate against the Machinists in violation of § 8(b)(2) and § 8(b)(1)(A) of the Act?

Thomas Rigging Company is a California Corporation engaged in hauling, rigging and installing machinery solely within the State of California. In August, 1951, the Company was engaged in the installation of machinery for the 81 mm. mortar shell line

at the Rheem Manufacturing Company plant, hereafter Rheem, located at San Pablo, California. This work was performed pursuant to a subcontract with Christensen and Lyons, the general contractor for the plant's construction and installation of all machinery and equipment. The sole purpose of the plant's construction was to manufacture ordnance material for the armed services. The Company installed machinery valued at approximately $1,500,000 shipped to the Rheem plant from various points outside the State of California. During the period from August 1, 1951, until April 1, 1952, the Company received approximately $52,000 for services rendered at the Rheem plant. From November, 1951, through March, 1952, Rheem shipped approximately $650,000 worth of shell components outside the State of California.

The Board exercised its jurisdiction here on two established grounds: First, respondent Company furnished services valued in excess of $50,000 per annum to Rheem, a company producing goods destined for out-of-state shipment valued in excess of $25,000 per annum. Hollow Tree Lumber Co., 91 N.L.R.B. 635. Second, respondent Company performed vital services to a company engaged in the production of goods for national defense. Westport Moving and Storage Co., 91 N.L.R.B. 902.

Respondent Company urges that it does not come within the Hollow Tree Lumber Company and the Westport Moving and Storage Company rules because it is a subcontractor and rendered services to a general contractor who in turn provided services to

a company engaged in interstate commerce. The fact that the Company installed the machinery under a sub-contract with Christensen and Lyons, the general contractor, rather than under contract directly with Rheem, does not require a different result. We made it clear in N.L.R.B. v. Reed, (9 Cir. 1953) 206 F.2d 184, that the policy of the Act to prevent the burdening or obstruction of interstate commerce cannot be frustrated by the simple expedient of sub-contracting. It is clear that a work stoppage in the Company's project of installing machinery at the Rheem plant due to a labor dispute would impede the production of vitally needed defense material. The assertion of jurisdiction by the Board was proper.

As to the second question: An employer violates § 8(a)(3) and (1) of the Act if he requires membership in a labor organization as a prerequisite for employment. N.L.R.B. v. Swinerton, (9 Cir. 1953) 202 F.2d 511; N.L.R.B. v. Cantrall, (9 Cir. 1953) 201 F.2d 853. The Board's finding that respondent Company refused to hire four applicants for employment because they were not members of the Millwrights is fully supported by the record.

The evidence discloses that each of the four applicants was informed by respondent Company's general foreman, Jack Burgman, that he could not obtain employment unless he received clearance from the Millwrights. Burgman told applicant Manuel Gonzalves that he could use him around the first of the week, but wanted to know to which union he belonged. On learning that he was a member of the Machinists

Burgman told Gonzalves not to quote him but it would be necessary for Gonzalves to belong to the Millwrights union and that he should arrange to see respondent Cecil, the Millwrights' business agent, as a condition precedent to employment at the plant. Burgman told applicant Rex Renner that he would like to have him on the job but that it would be necessary for him to go down and get a clearance from Cecil. Renner stated that he doubted whether he could get a clearance because he was a Machinist, to which Burgman answered that there was a position open if he could get the clearance. Later Renner informed Burgman that Cecil refused to give him a clearance. Burgman then stated that his hands were tied and that he had to take the men that the Millwrights sent out on a clearance. Burgman informed applicant Leroy Young that there was no position open but that he expected more work during the following week and for Young to leave his name and address. Burgman told Young that if he got the job he would be required to get a clearance from Cecil at the Carpenters' Hall. Young asked why this was so and Burgman replied that the Company was "bound by the AGC [Associated General Contractors of America, Inc.] and any men coming down here hired on this job must be cleared through the Millwrights." Four days later when Young returned to the plant and renewed his request for work he was told that there were no openings but that he would be called when a job became available. Respondent Company did not contact Young with an offer of a job. Ap-

plicant Phillip Glen applied for work. He was asked by Burgman whether he was a Machinist. Glen answered that he was and Burgman said that all his men were Millwrights and there were no jobs open. Burgman said he would call Glen if something developed. Glen was not called.

Respondent Company maintains that it hired the most qualified help without regard to union affiliation. It claims that because of the dangerous nature of the work it followed a practice of hiring only former employees or persons with whose work foreman Burgman was familiar. Although witnesses for the Company denied that it followed a discriminatory hiring policy the trial examiner discredited this testimony. In doing so we think he properly exercised his function of determining the credibility of witnesses. N.L.R.B. v. Local 743, United Brotherhood of Carpenters & Joiners of America (9 Cir. 1953) 202 F.2d 516; N.L.R.B. v. Dant, (9 Cir. 1953) 207 F.2d 165. The evidence establishes that the reason for the denial of employment to the four Machinists was because of their failure to obtain clearances from the Millwrights. Qualifications and previous employment by the Company played no part in it. Each of the applicants had had considerable experience in installing machinery. Burgman, in so many words, stated that they would be acceptable employees. During the period in question, the Company hired several men who had no previous employment with it. Nor does the evidence support the Company's final contention that a lack of available work justified the Company's refusal to hire the four machinists. Burgman's state-

ments to both Gonzalves and Renner disclose that the Company wanted the two men and that there were jobs available for them. About the time that Gonzalves and Renner applied for employment, foreman Burgman was trying to locate three Millwrights whom he wished to hire. Two of these men were located and hired five days after Gonzalves and Renner had unsuccessfully sought employment. It is significant that eight men were hired for erection work after the four machinists requested employment—not one of the eight was a member of the Machinists. We think our statement in N.L.R.B. v. Swinerton, (9 Cir. 1953) 202 F. 2d 511, 515, has application here:

"* * * the job applicants were told that they could not obtain employment unless they received clearance from the Millwrights. Where such an illegal requirement has been imposed, and it is apparent from such discriminatory hiring policy that further application for employment would be futile, the job applicants need not go through the useless procedure of reapplying for employment at the later time when jobs are actually available in order to establish that they were victims of the discriminatory hiring policy."

The Board was not unanimous in its finding that respondent Millwrights and its business agent Cecil committed an unfair labor practice by being a party to the Company's discriminatory hiring arrangement and thereby causing the Company to refuse employment to four Machinists. There is grave doubt as to the sufficiency of the evidence to support such a finding. The evidence points unerringly to an unlawful

hiring policy on the part of the Company. There is no direct evidence to connect the Millwrights or its business agent with the Company's unlawful conduct. The statements made by Burgman to the four Machinists were in no way binding upon respondents Cecil or Millwrights. The question then posed is, can the Millwrights be held legally liable on inferences alone? A majority of the Board considered its findings to be substantially supported by the testimony of Gonzalves and Renner as to the statements of Cecil when they asked him for a clearance. As dissenting Board member Murdock points out, their version of what Cecil said reveals merely that Cecil refused to issue clearances to any person not a member of his union. This he could properly do. Nor did Cecil have an affirmative duty to disavow any unlawful understanding between the Millwrights and the Company merely because two Machinists came to him for a clearance. This failure to disavow looms large in the eyes of the Board as establishing an agreement to confine employment to members of the Millwrights, but we think it does not justify the significance given it. The burden of proof placed upon the general counsel was not satisfied by a mere showing that the existence of such an agreement was consistent with the Company's unilateral conduct. Many reasons may have motivated the Company in its discriminatory hiring policy and it is not improbable that it voluntarily chose to do so on a unilateral basis.

There is direct evidence that the Millwrights Local 642 was not a party to the Company's unfair labor

practice. Witnesses Cecil and Burgman denied the existence of any arrangement with the Company and their testimony was supported by the fact that no member of respondent Millwrights Local 642 at any time did millwright work on the Rheem job. Not one of the men who worked on the job had a clearance from Local 642.

We do not lose sight of the fact that we should not substitute our judgment for that of the Board as to the credibility of witnesses or reasonable inferences drawn from the testimony, but we are functioning within our proper sphere when we say that mere speculation is not sufficient to uphold a finding of an unfair labor practice.

Decree will be entered enforcing the Board's order as to the respondent Company but not as to respondents Cecil and the Millwrights.

(Endorsed:) Opinion. Filed Mar. 10, 1954. Paul P. O'Brien, Clerk.

In the
United States Court of Appeals
For the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Thomas Rigging Company and Carpenters Union, Local No. 642, United Brotherhood of Carpenters & Joiners of America, A.F.L., and Harry Cecil, Business Agent of Respondent Union, Respondents.	No. 13,838

DECREE

Before: Healy, Orr and Pope, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated January 8, 1953. The Court heard argument of respective counsel on January 26, 1954, and has considered the briefs and the transcript of record filed in this cause. On March 10, 1954, the Court being fully advised in the premises, handed down its decision enforcing in part and denying in part the said order. In conformity therewith, it is hereby

Ordered, Adjudged and Decreed That:

1. Thomas Rigging Company, Emeryville, California, its officers, agents, successors and assigns shall:

A. Cease and desist from:

1. Discouraging membership in International Association of Machinists and encouraging membership in Carpenters Union, Local No. 642, United Brotherhood of Carpenters & Joiners of America, AFL, or in any other labor organization of its employees or applicants for employment, by refusing to employ any qualified applicant for employment, or by discriminating in any manner in regard to hire or tenure of employment or any term or condition thereof, except to the extent permitted by Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter referred to as the Act).

2. In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or the right to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement authorized under Section 8 (a) (3) of the Act.

B. Take the following affirmative action which the Board has found will effectuate the policies of the Act.

1. Offer to Manuel Gonzalves, Rex Renner, Leroy P. Young, and Philip Glen immediate and full em-

ployment, and make them whole for any loss of pay suffered as a result of the discrimination against them, as provided in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated June 12, 1952 entitled "The remedy."

2. Upon request, make available to the Board or its agents for examination or copying all payroll and other records necessary to analyze the amounts of back pay due.

3. Post at its principal office and at its construction office at the Rheem plant, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twentieth Region, San Francisco, California, shall, after being duly signed by the Company's representative, be posted by the Respondent Company immediately thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material.

4. Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree what steps it has taken to comply herewith.

It Is Further Ordered, Adjudged and Decreed that enforcement of the portion of the said order directed against Respondent Union, Carpenters Union, Local No. 642, United Brotherhood of Carpenters & Joiners

of America, AFL, its officers, representatives, and agents, and Respondent Harry Cecil, business agent of Respondent Union, be and it hereby is denied.

Endorsed. Decree Filed and Entered Jun 11 1964

Paul P. O'Brien
Clerk

Appendix A

Notice To All Employees
Pursuant To

A Decision of the United States Court of Appeals enforcing in part an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not discourage membership in International Association of Machinists or encourage membership in Carpenters Union, Local No. 632, United Brotherhood of Carpenters and Joiners of America, AFL, or in any other labor organization of our employees or applicants for employment, by refusing to employ qualified applicants for employment, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition thereof, except to the extent authorized by Section 8 (a)(3) of the Act.

We Will Not in any other manner interfere with, restrain or coerce applicants for employment or our employees in the exercise of the right to self-organization, to form, join or assist International Association of Machinists or any other labor or-

ganization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

We Will offer to the individuals named below immediate and full employment in the positions previously applied for, or in positions substantially equivalent thereto, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered as the result of our discrimination against them.

Manuel Gonzalves	Philip B. Glen
Rex Renner	Leroy P. Young

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named labor organizations or any other labor organization, except to the extent that such right may be affected by an agreement executed in conformity with Section 8 (a) (3) of the Act.

Thomas Rigging Company
(Employer)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. § 141 *et seq.*, are as follows:

Section 10.

(b) * * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C. title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimina-

tion suffered by him: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part

the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of Title 28.

PURCHASE ORDER
FROM

CHRISTENSEN & LYONS

8484 HARLAN STREET
OAKLAND 8, CALIFORNIA
Phone Olympic 2-8486

Order No 12497

Job No. 695-B

Date Sept. 19, 1951

THE ABOVE NUMBERS MUST APPEAR ON ALL INVOICES, PACKAGES, SHIPPING LISTS AND CORRESPONDENCE.

TO

Thomas Rigging Company
1505 Sixty-Second Street
Emeryville, California

OUR CONTRACT WITH

Rheem Manufacturing Company
Equipment Installation
81 mm Mortar Shell Line

IMPORTANT
This order is given by Christensen and Lyons, and is accepted by the vendor subject to the terms and conditions on the face and on the other side of this order.
Invoices Must Be Rendered in Duplicate to Oakland Office

SHIP VIA
DATE WANTED as required at
TERMS OF DELIVERY

JOB ADDRESS N. W. Corner County Road #20 and S.P.R.R., San Pablo, California

Item No.	Quantity	Description
		Furnish the necessary labor, materials and equipment and insurance required to do the millwright and rigging work as directed for the installation of machinery for the 81mm Mortar Shell Line.

Certified under regulation 2, DO-B-9
Government contract DA-04-200-ORD-28

Subject to the renegotiation act of 1948 as amended.

Prices to be in accordance with your proposal of August 1, 1951
a copy of which is attached.

No charges for Crating or Packing will be allowed.

H. J. Christensen Co. & W. E. Lyons Construction Co.

H C Enslie

THOMAS RIGGING COMPANY
1505 Sixty-Second Street
Emeryville, California

August 1, 1951

Christensen and Lyons
3454 Harlan St.,
Oakland 8, California

Att: Mr. Emslie

Gentlemen:

We are pleased to quote present rates in effect for work to be done at Rheem Manufacturing Company, San Pablo Plant, which have been increased in several classifications to reflect recent wage increases and increased cost of operation.

	Straight Time	Overtime
Foreman Rigger	4.75 hr.	Double Time
Riggers	4.50	" "
Foreman Millwright	4.75	" "
Millwrights	4.50	" "
Teamsters helpers	4.00	Time and one-half
Timekeeper - Purchasing Agent with Pickup	4.00	" " " "
Winch and A Frame Trucks with drivers	7.00	8.75 hr
Semi Trucks and Drivers	8.80	10.55
Derrick Trucks and Operators	11.00	12.75
20 Ton Cap. Truck Crane, Opr & Oiler	16.00	22.00
Over 20 Ton Cap " " "	20.00	26.00
Lobed Truck & Driver 18 to 30 Ton Cap.	12.48	14.23
Lobed Truck & Driver over 30 Tons Cap.	13.26	15.01
Pickup Truck with Driver	4.50	6.2[illegible]
Welding Machines	1.50	

Riggers, crane operators and oilers working out of town $3.25 per day subsistence.
Truck drivers and helpers working out of town $6.00 per day subsistence.
The above rates are subject to change due to increase or decrease in labor contracts and/or Government regulations.
Material purchased to be charged at cost.
Time and material to be billed monthly on the various items.

We carry Workmans Compensation insurance, public liability insurance with $100/$300,000 limits and property damage insurance with $100,000.00 limits.

Trusting that the above prices will meet with your approval, we remain

Yours very truly,

THOMAS RIGGING COMPANY

By Wayne Dalsell
Vice President

Appendix D

The following tables of workmen's compensation insurance premium rates and premiums paid by the Company at the Rheem San Pablo plant job illustrate the relative hazards of employment (R. 310-311):

	Employee Classification	Premium Rate per $100	Payroll	Premium
	(August, 1951)			
A.	Office employees	$ .10	$ 1,109.84	$ 1.10
B.	Sales employees, outside collectors, etc.	.25	2,200.00	5.50
C.	Trucking, repairmen, blacksmiths, garagemen, terminal men, etc.	3.78	14,459.62	546.57
D.	*Millwrights & riggers*	*18.44*	*3,614.90*	*666.59*
	(September, 1951)			
A.	Office employees	$ .10	$ 1,124.64	$ 1.12
B.	Sales employees, outside collectors, etc.	.25	2,200.00	5.50
C.	Trucking, repairmen, blacksmiths, garagemen, terminal men, etc.	3.78	10,792.36	407.95
D.	*Millwrights & riggers*	*18.44*	*2,698.09*	*497.52*

Appendix E

The following millwrights were employed by the Company at the Rheem job:

Name	First employed at Rheem job	First employed by Company	Termination of Employment (as of 1/1/52)
W. Bouslog	8/ 6/51	1949	still there
L. Shepard	8/ 7/51	1949	" "
D. Dinger	8/ 8/51	1949	12/14/51
C. D. Greathouse	8/ 8/51	8/ 8/51	still there
D. E. Rath	8/13/51	1949	" "
H. O. Allen	8/13/51	2/12/51	" "
L. F. Belcher	9/ 6/51	9/ 6/51	" "
O. L. Rainey	10/ 2/51	1949	" "
L. Drury	10/ 2/51	10/ 2/51	" "
M. W. Colbuth	10/10/51	10/10/51	" "
H. Powert	10/10/51	10/10/51	10/19/51
V. L. Thompson	10/11/51	1949	12/14/51
H. G. Ramsey	10/11/51	10/11/51	12/14/51
B. W. Spencer	11/ 6/51	11/ 6/51	12/14/51

Of the employees who were hired by the Company for the first time at the Rheem job, the following had worked under Superintendent Burgman's personal direction on other jobs: C. D. Greathouse (R. 327), L. F. Belcher (R. 328-329), H. G. Ramsey (R. 330); B. W. Spencer and M. W. Colbuth were brought in by other employees of the Company (R. 330, 331-332); L. Drury was hired at the job site (R. 329).

Appendix F

BOARD'S STANDARDS TO EXERCISE ITS JURISDICTION.

Current Standards

The Board now asserts jurisdiction over the following types of employers:

1. Instrumentalities and channels of commerce, interstate or foreign, except that:

Jurisdiction will be exercised over intrastate trucking companies and similar firms which are links in interstate commerce only if they do at least $100,000 worth of business annually for other concerns in categories numbered 1, 2, or 4.

Jurisdiction will be asserted over radio and television stations only if their gross annual revenue amounts to at least $200,000 and over newspapers only if their gross annual income amounts to at least $500,000.

2. Public utility and transit systems:

(a) Local power, gas, and water utilities and local or intrastate public transit systems only if the company does a gross annual business of $1,000,000 or more.

(b) Public transit systems engaged in interstate commerce if the gross annual revenue from interstate operations amounts to at least $100,000.

3. An establishment operating as an integral part of a multi-state enterprise, other than a retail or service establishment, if one of the following tests is met:

(a) The *plant involved* has a direct outflow of goods into interstate commerce amounting to $50,000 a year (thus meeting the standard of category 4) or furnishes goods to the value of $100,000 a year to interstate concerns coming within categories 1, 2, or 4 of this list, or

(b) If the plant involved does not meet the separate plant tests listed in (a) above, jurisdiction will be asserted if the multi-state enterprise, of which the plant is a part, has a total outflow of $250,000 a year into interstate commerce.

Jurisdiction will *not* be exercised over an establishment solely because it is operating under a franchise from a national enterprise. Jurisdiction will be exercised over franchised establishments only if they satisfy some other standard in this plan.

4. Enterprises other than retail stores, producing or handling goods destined for out-of-state shipment or performing services outside the state in which the firm is located, where such goods or services are valued at $50,000 a year.

5. Enterprises furnishing *goods* or services that become part of the stream of commerce amounting to $100,000 a year or more to concerns in categories 1, 2, or 4, except that:

Jurisdiction will *not* be exercised over enterprises supplying materials to other firms which do interstate business unless the materials themselves ultimately go outside the state.

6. Enterprises furnishing *services,* other than those in category 5, amounting to $200,000 a year or more to concerns in categories 1, 2, 4, or if the establishment involved is part of a multi-state chain, jurisdiction will be exercised if the chain furnishes services amounting to $1,000,000 or more per year to concerns in categories 1, 2, or 4, except that:

Jurisdiction will *not* be exercised over general or public office buildings merely because such buildings have tenants over which the Board takes jurisdiction.

7. Enterprises other than retail establishments which have a direct inflow of goods or materials from out of state valued at $500,000 a year or more.

8. Enterprises, other than retail establishments, with an indirect inflow of goods or materials valued at $1,000,000 a year or more.

9. Retail stores:

(a) *Independent retail stores,* whether a single store or part of a chain operating entirely within a state, only if

(1) the store involved in the case has annual purchases amounting to at least $1,000,000 coming to it directly from outside the state, *or*

(2) the store involved has annual purchases of $2,000,000 coming to it indirectly from outside the state, *or*

(3) if the store ships $100,000 worth of merchandise into another state or states.

(b) *Chains of retail stores,* with stores in more than one state, only if

(1) the individual store involved meets either of the tests for intrastate stores, *or*

(2) the chain has gross annual sales totalling $10,000,000 or more.

Jurisdiction will *not* be exercised over public restaurants regardless of source and volume of materials and regardless of whether the restaurant is part of a multi-state chain.

10. Establishments affecting the national defense, where the goods or services furnished are directly related to national defense, *and* amount to at least $100,000 annually, *and* are furnished pursuant to a government contract.

To come within the Board's jurisdiction, a company must meet all three tests.

Former Standards

The former tests used by the Board in taking jurisdiction over cases were as follows:

1. Instrumentalities and channels of interstate and foreign commerce, e.g., a radio station, *W.B.S.R.Inc.*, 91 N.L.R.B. 630.

2. Public utility and transit systems, *W.C.King*, 91 N.L.R.B. 623.

3. Establishments operating as an integral part of a multistate enterprise. *The Borden Co.*, 91 N.L.R.B. 628.

4. Enterprises producing or handling goods destined for out-of-state shipment, or performing services outside the state in which the firm is located,

valued at $25,000 a year, *Stanislaus Implement and Hardware Company, Ltd.*, 91 N.L.R.B. 618.

5. Enterprises furnishing goods or services of $50,000 a year or more to concerns in categories 1, 2 or 4, *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635.

6. Enterprises with a direct inflow of goods or materials from out-of-state valued at $500,000 a year, *Federal Diary Co., Inc.*, 91 N.L.R.B. 638.

7. Enterprises with an indirect inflow of goods or materials valued at $1,000,000 a year, *Dorn's House of Miracles*, 91 N.L.R.B. 632.

8. Enterprises having such a combination of inflow or outflow of goods or services coming within categories 4, 5, 6 or 7, that the percentages of each of these categories, in which there is activity, taken together add up to 100, *The Rutledge Paper Products, Inc.*, 91 N.L.R.B. 625.

9. Establishments substantially affecting the national defense, e.g., a contract *directly* with the armed forces, *Westport Moving and Storage Company*, 91 N.L.R.B. 902.

See *National Labor Relations Board v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 685 n. 14; 16th Annual Report of the National Labor Relations Board, pp. 15-16 (1951).

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Section 8(b)(2)	16
Act of October 22, 1951, 65 Stat. 601	16

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A, pp. 1-9) is reported at 211 F. 2d 153. The findings of fact, conclusions of law, and order of the National Labor Relations Board, including the Intermediate Report of the Trial Examiner (R. 20-59, 70-83), are reported at 102 NLRB 65.

JURISDICTION

The judgment of the court below was entered on June 11, 1954 (Pet. App. A, pp. 10-14). A peti-

tion for rehearing was denied on June 8, 1954. The petition for a writ of certiorari was filed on September 3, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The Board found that petitioner violated the National Labor Relations Act (a) by discriminating against job applicants because of their union membership and (b) by acting in concert with a labor organization to engage in such conduct, and the court of appeals determined that the charge of discrimination by petitioner was supported by the record, but that proof of an understanding between petitioner and the labor organization was not adequately established. The questions presented are:

1. Whether the court erred in enforcing the Board's order against petitioner without remanding the case to the Board for further consideration.

2. Whether the Board's assertion of jurisdiction over petitioner was proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in Appendix B to the Petition (pp. 15-17) and *infra*, pp. 14-16.

STATEMENT

I. The Board's Findings of Fact

The Board made ultimate findings (1) that petitioner's operations affected commerce within the

meaning of the National Labor Relations Act (R. 71; 26-27); (2) that petitioner denied employment to four job applicants "for express discriminatory reasons" (R. 72, n. 3), *i.e.*, because they were not members of the Millwrights' Local (Local 642, United Brotherhood of Carpenters and Joiners, AFL), thus violating the Act; and (3) that petitioner also violated the Act, together with the Millwrights, by agreeing to adopt and by following an unlawful hiring arrangement pursuant to which job applicants had to be "cleared" by the union (R. 75).[1] The subsidiary facts upon which these findings rest, insofar as pertinent here, may be summarized as follows:

A. *Petitioner's operations at the Rheem Plant*

Petitioner is engaged in hauling, rigging, and installing machinery solely within the State of California (R. 23; 95-96). In August 1951, petitioner began installing machinery at the San Pablo, California, plant of the Rheem Manufacturing Company, which had recently been constructed for the purpose of manufacturing ordnance material for the armed forces (R. 23; 117-118, 125). The machinery installation was performed by petitioner under a subcontract with Christensen and Lyons, the general contractor for the plant's construction

[1] Petitioner's acts of discrimination against the named job applicants and its alleged general understanding with the Millwrights to follow a system of clearances had been made the subject of separate charges in the complaint. R. 10-11.

(R. 23-24; 118-122, 108). Under that subcontract petitioner agreed to move the machinery from the railroad siding on the plant's premises and to install it at the appropriate place within the plant (R. 24; 126).

The machinery installed by petitioner is valued at more than $1,500,000 and is used in the manufacture of mortar shells and cartridge cases for the armed forces (R. 25; 102, 119-120). All of the machinery was paid for by the Government and shipped to the Rheem plant from arsenals and plants in various States of the United States (R. 25; 119, 127).

During the period from August 1951 to the first of April 1952, petitioner was paid approximately $52,000 for its services in moving and installing machinery at the Rheem plant (R. 25; 102-105). From November 1951 through March 1952, the value of shell components manufactured by Rheem and shipped outside of California was $650,000 (R. 124). In April 1952 alone, $389,000 worth were shipped across state lines (R. 25; 123).

Upon the above facts, the Board concluded that petitioner's operations affected commerce within the meaning of the Act and that the assertion of jurisdiction in this case would effectuate the policies of the Act (R. 71; 26-27).

B. *The unfair labor practices*

On August 8, 1951, Manuel Gonsalves asked petitioner's general foreman, Jack Burgman, for work

at the Rheem plant (R. 30; 128-129, 134). Burgman stated that he could use Gonsalves "around the first of the week" and asked him "what local [he] belonged to" (R. 31; 131-132, 137). Gonsalves stated that he belonged to International Association of Machinists (hereinafter called the Machinists) (*ibid.*). Burgman, himself a member of Millwrights Local 102 of the International Brotherhood of Carpenters, told Gonsalves "not to quote him" but that he would "have to belong to the Millwrights Union" and that he would have "to see" Cecil, the business agent of the Carpenters "before [he] could go to work there." (R. 71, n. 3, R. 72, 31; 135-137, 131-132).

Rex Renner, another member of the Machinists, applied for work at the plant on August 9, 1951 (R. 32; 151-153). Burgman told Renner that he "would like" to have him on the job but that Renner "would have to go down and get clearance to go to work from Mr. Cecil" (R. 32; 153). When Renner expressed doubt that Cecil would clear him in view of the fact that he (Renner) was a member of the Machinists, Burgman replied that there was a position open for him if he could obtain clearance from Cecil (*ibid.*). On August 13, 1951, Renner reported to Burgman that Cecil had refused to give him a clearance (R. 33; 153). Burgman answered that his hands were "tied" and that he had to take the men "they issue us a clearance" (R. 33; 155-156).

On August 13, 1951, Leroy Young, also a member

of the Machinists, asked Foreman Burgman for work installing the machinery (R. 34; 170-171). Burgman replied that he would need men the following week and that Young should leave his name and address with the timekeeper so that Burgman could reach him (R. 34; 170-171). After leaving the information, Young asked Burgman "If I did get the job who would I have to get the clearance from" (R. 35; 171). Burgman replied that Young would "have to see Mr. Cecil down at the Carpenter's Hall" (*ibid.*). Young then asked Burgman why this was so, and Burgman said, "Well, we are bound by the AGC [Associated General Contractors of America, Inc.],[5] and any man coming down here hired on the job must be cleared through Millwrights" (R. 35; 171-172).

On September 4, 1951, Philip Glen asked Burgman for a job (R. 36-37; 198). When Glen, in response to Burgman's inquiry, stated that he was a member of the Machinists, Burgman replied that there were no jobs open at that time and anyhow that "all my men are millwrights." Glen left his name with Burgman. (R. 37; 199-200.)

Petitioner did not thereafter offer employment to any of the four applicants (R. 37; 199). However, at about the time that Gonsalves and Renner applied for employment, Foreman Burgman sought the aid of Cecil in locating three AFL millwrights

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[5] Referring to a master agreement between AGC and the Carpenters' Union which contained a union shop provision. This provision, as the Board found (R. 74, n. 4), was not effective during the period here in question.

for employment (R. 44; 226-229, 337-339). Two of these were hired on August 13, 1951, five days after Gonzalves and Renner had unsuccessfully sought employment and the same day that Young applied (R. 44-45; 296, 322, 343). A total of eight men were hired for erection work after the four Machinists requested employment but not one of the eight was a member of the Machinists (R. 43-45, 47; 283, 291-298, 300-301, 343-344).

II. The Board's Conclusions and Order

The Board held that the evidence summarized above, standing "alone," showed that petitioner had discriminated against the four named applicants because they were not members of the Millwrights and had not obtained clearance from that union, and that it accordingly established a violation of section 8(a)(3) of the Act (R. 72, n. 3). The Board further found that petitioner discriminated against these applicants as a direct result of an arrangement or understanding with the Millwrights, and that petitioner and the Millwrights had thereby violated, respectively, section 8(a)(1) and (3) and section 8(b)(2) and (1)(A) of the Act (R. 73-75).[5]

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[5] Since, as we explain below (pp. 9-10), petitioner's conduct was violative of the Act, whether or not it was acting pursuant to an understanding with the Millwrights, we have not set forth in detail the evidence which the Board deemed sufficient (but which the court of appeals regarded as inadequate) to establish that the Millwrights were party to such an understanding. See R. 31, 32, 73-75.

The Board ordered petitioner and the Millwrights to cease and desist from the unfair labor practices found. It also directed that petitioner offer the four named individuals immediate employment; that petitioner and the Millwrights jointly and severally make them whole for any loss of pay they may have suffered by reason of the discrimination against them; and that both post appropriate notices of compliance with the order (R. 77-81).

III. The Decision of the Court of Appeals

The court below (Pet. App. A, pp. 19) upheld the Board's assertion of jurisdiction. It also affirmed as "fully supported by the record" the Board's finding that petitioner had refused to hire the four job applicants because they were not members of the Millwrights. It accordingly enforced the Board's order against petitioner. However, it set aside the order insofar as it was directed to the Millwrights, stating that the "evidence point-[ed] unerringly to an unlawful hiring policy on the part of [petitioner]," but that it was insufficient to establish a connection by the Millwrights with petitioner's unlawful conduct.[4]

ARGUMENT

1. Petitioner contends (Pet. 10-13) that the court below, having rejected the Board's finding that the discriminatory refusal to hire the four job applicants resulted from an understanding between

[4] This was also the position of Board Member Murdock, who dissented in part from the Board's decision (R. 81-83).

petitioner and the Millwrights, should have remanded the case to the Board to determine whether petitioner had "unilaterally" discriminated against them. The short answer is that the Board found that, irrespective of proof of an understanding with the Millwrights, petitioner's refusal to employ the four applicants was for "express discriminatory reasons" (R. 72, n. 3). On this basis alone, the Board found that it was "clear" that petitioner had engaged in an unfair labor practice prohibited by the Act (*ibid.*). The evidence fully justified this conclusion and there is no occasion for a second review of the underlying factual issue. *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 503.

This is not, as petitioner seeks to argue, a case in which the court has provided new findings and a new rationale in order to sustain the administrative order. It is a case in which the Board's order, so far as petitioner is concerned, was rested on two grounds, each of them independently sufficient to establish a violation of the Act. The finding set aside by the court was necessary only to a holding that the Millwrights had also violated the Act. The court's rejection of the Board's conclusion that an *agreement* to discriminate was sufficiently established did not impair the Board's conclusion that the evidence showed *actual* discrimination of a prohibited kind by petitioner.

Petitioner's further assertion (Pet. 17) that the court enforced the Board's order on the basis of a

"not improbable" finding of fact and thereby substituted "[s]peculation * * * for proof" misstates the court's opinion. The court found (Pet. App. A, pp. 7-8) that "the evidence points unerringly to an unlawful hiring policy on the part of [petitioner]." It added, in exculpating the Millwrights from responsibility for petitioner's discriminatory hiring policy, that (Pet. App. A, p. 8) "it is not improbable that [petitioner] voluntarily chose to do so on a unilateral basis." Whether petitioner adopted its illegal hiring policy unilaterally or by agreement with others is, of course, irrelevant to the question of petitioner's responsibility under the Act. It is enough that petitioner discriminated against the four applicants on the basis of their union membership.[5]

2. Equally lacking in merit is petitioner's contention (Pet. 13-15) that the court below disregarded petitioner's status as a subcontractor and erroneously sustained the Board's exercise of jurisdiction in the instant case. As stated above (pp. 3-4), at the time the unfair labor practices occurred, petitioner was engaged in installing at the Rheem plant machinery which was being shipped there from points outside the State of California. The

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[5] *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 45 (n. 53), 54; *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C.A. 6); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C.A. 8); *National Labor Relations Board* v. *Fry Roofing Co.*, 193 F. 2d 324, 327 (C.A. 9); *National Labor Relations Board* v. *Don Juan Co.*, 185 F. 2d 393 (C.A. 2).

plant had been constructed, and the machinery being installed by petitioner was to be used, for the purpose of manufacturing military supplies for the armed forces. These, in turn, were to be shipped to various states. Manifestly, any labor dispute arising out of the installation of the machinery would have tended seriously to hamper both the movement of the machinery across state lines and Rheem's interstate operations. The potential adverse impact of industrial strife upon the interstate movements of the machinery and of the manufactured military supplies sufficed, under established principles, to sustain the Board's jurisdiction over petitioner.[6] The circumstance that petitioner was a subcontractor at the Rheem plant does not militate against this conclusion. For, as the court below correctly pointed out, "the policy of the Act to prevent the burdening or obstruction of interstate commerce cannot be frustrated by the simple expedient of sub-contracting" (Pet. App. A, p. 4)[7]

[6] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197; cf. *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 661-662, 665; *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173, 175-177; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 525, 526; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 14; *Thomas* v. *Hempt Bros.*, 345 U.S. 19. See also, *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601; *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 683-685; *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647-648.

[7] Nothing in *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, cited by petitioner, suggests a contrary result.

Contrary to petitioner's assertion (Pet. 13-15), there is no conflict between the decision here and the Board decisions cited in the petition. In those cases, decided subsequent to the Board's decision here, the Board, in the exercise of its discretionary authority (*National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 684), has merely enunciated standards which are to govern the future exercise of its statutory jurisdiction. There is no suggestion in those cases that the Board lacks jurisdiction over an enterprise like petitioner's. All that they indicate is that under its revised standards the Board might not currently assert its statutory jurisdiction over a person similarly situated. "The fact that by a self-denying rule or order made since this complaint was filed and order entered, the Board has set limits to the exercise in the future of the jurisdiction it possesses is not a matter of which [the petitioner] may avail."[8] *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C.A. 5), certiorari denied, 341 U.S. 950. So long as "the

[8] The court below did not specifically address itself to this question. The Eighth Circuit in *National Labor Relations Board* v. *National Gas Co.*, decided August 10, 1954, 34 LRRM 2694, has held, for reasons that are not entirely clear, that a Board order directed to an enterprise over which the Board would not assert jurisdiction under its current policy was not entitled to enforcement. The court apparently gave decisive weight to the circumstance, not present here, that the Board had subsequently "expressly overruled" the decision in which the order had been issued because the Board deemed it to be an "unwarranted extension" of its then controlling jurisdictional policy (*Brooks Wood Products*, 107 NLRB No. 71).

Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U. S. 909.[9]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER, 1954.

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[9] *Accord: Haleston Drug Stores, Inc.*, v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C.A. 9), certiorari denied, 342 U.S. 815; *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C.A. 2), affirmed, 341 U.S. 694.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the petition, are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the em-

ployees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:][10] * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *;

* * * * *

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[10] By the Act of October 22, 1951, par. (b), 65 Stat. 601, Section 8 (a) (3) of the Act was amended by striking out the bracketed portion of the first sentence and inserting in lieu thereof the following:

"and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), and (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

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In the Supreme Court
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OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF.

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In the Supreme Court
OF THE
United States

October Term, 1954

No. 329

Thomas Rigging Company,
Petitioner,
vs.
National Labor Relations Board,
Respondent.

PETITIONER'S REPLY BRIEF.

The real basis of this petition is the conflict among the circuits on the principal questions of:

1. Whether a Board order should be enforced against an employer, where, by intervening changes of policy and rules, the Board no longer asserts its jurisdiction over such employer.

2. Whether the Court may enforce an order against a subcontractor employer twice removed from interstate commerce.

In our petition, we pointed out that the Court of Appeals erred in extending the jurisdiction of the Board to a subcontractor twice removed from interstate commerce, contrary to the Board's intervening policy and decisions. However the National Labor Relations Board's brief in opposition, in seeking to answer the contentions made in the petition (Pet. 9, 13-16), hurries over the conflict between the several circuits, and thus demonstrates the need for settlement by this Court of an important question of federal law, namely:

Whether changes by the National Labor Relations Board in policy, either by decision, regulation or jurisdictional standards, are applicable to cases pending in enforcement proceedings, to prevent enforcement of an order made prior to such change.

Accordingly, the purpose of this reply brief is to show:

(a) The error in the Board's argument and its attempt to minimize the conflict between the circuits; and

(b) To direct the attention of this Court to the particular errors of the Court below. (See Pet. 9, specifications 4, 5, 6 and 7).

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1. **MAY THE COURTS BELOW ENFORCE ORDERS IN CASES IN WHICH THE BOARD WILL NO LONGER EXERCISE JURISDICTION?**

The question of whether, in enforcement proceedings, the Court of Appeals may base its decision on

the old rule, or whether the Court is bound by the new policies of the Board, changing the old rule, is now before this Court in two cases: The petition herein, No. 329, and *Foreman & Clark v. National Labor Relations Board,* No. 389, October Term, 1954, also from the Ninth Circuit.

a. The National Gas Company Case.

National Labor Relations Board v. National Gas Co., 8 Cir., 1954, 215 F. 2d 160, 162, 163, concerns circumstances similar to those herein.

In that case the Board sought enforcement of its order of May 27, 1952, against the employer. On November 30, 1953, while enforcement proceedings were pending, the *Brooks Wood Products* decision, 107 NLRB No. 71, was handed down. There the Board had declined to assert jurisdiction under circumstances similar to those in the *National Gas Co.* case.

The Court of Appeals for the Eighth Circuit denied the enforcement of the Board's order, explaining that since, as conceded by Board counsel, the company did not come within the scope of the Board's present jurisdictional requirements, the reviewing Court must apply the law in its present form, and not as it existed at the time of the decision and order of the Board.[1]

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[1]215 F.2d at 163. The Court cited the following cases supporting this rule: *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538; *Carpenter v. Wabash R. Co.*, 309 U.S. 23; *Schaff v. R. W. Claxton, Inc.*, D.C. Cir. 1944, 144 F.2d 532; *Schilder v. Gusik*, 6 Cir. 1950, 180 F.2d 662. Decisions of this Court affirming this rule are set out in Appendix A-1, *post*.

The Appellate Court also discussed the Board's decision that new regulations shall apply to *pending* as well as future cases, and the effect such provision would have on post-enforcement proceedings.[2]

b. The Petitioner's Case Herein.

The trial examiner upheld the Board's jurisdiction over petitioner, a subcontractor twice removed from interstate commerce, by relying on the *Hollow Tree Lumber Co.*[3] and *Westport Moving & Storage Co.*[4] cases (R. 26, 27). This determination was affirmed by the Board[5] (R. 71).

The Board's petition for enforcement was filed in the Court below on May 13, 1953, and the Board's brief was filed on September 1, 1953. Thereafter petitioner herein filed its brief.

Subsequently, the Board rendered its rulings in the *Brooks Wood Products,*[6] *Casey Welding Works,*[7] and *Atkinson Electric Co., Inc.*[8] cases. Each of these held that it would not effectuate the policies of the Labor Management Relations Act for the Board to assert jurisdiction over a subcontractor employer whose services are twice removed from interstate commerce. In the latter two decisions, the Board

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[2] 215 F.2d at 163. See 34 LRR 261, Board's announcement of standards applying to pending cases.
[3] 91 NLRB 635.
[4] 91 NLRB 802.
[5] 102 NLRB 1.
[6] 107 NLRB No. 71.
[7] 107 NLRB No. 185.
[8] 108 NLRB No. 105.

also emphasized that the *Hollow Tree Lumber Co.*[9] and *Westport Moving & Storage Co.*[10] standards were *not* applicable to subcontractors.

The majority of the Board in *Casey Welding Works*[11] held, in effect, that the decision of the Board in the case herein, *Thomas Rigging Company*,[12] was no longer the law (See Pet. 13-16).

The Court below affirmed the Board's exercise of jurisdiction by relying on the *Hollow Tree Lumber Co.*[13] and *Westport Moving & Storage Co.*[14] cases (Pet., Appendix A, 3). It rejected petitioner's argument that the Board's then, and now, current rule was that the standards of such cases were no longer applicable to subcontractors (Pet., Appendix A, 3-4).

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2. THE CONFLICT AMONG THE CIRCUITS.

The Board admits that it would not assert its statutory jurisdiction over a person in petitioner's circumstances at the present time (Board Br. 12). The question now is whether the Courts below must recognize the shifts in Board policy in enforcement proceedings.

The *National Gas Co.* decision holds that an order of the Board will not be enforced against an employer

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[9] 91 NLRB 635.
[10] 91 NLRB 602.
[11] 107 NLRB No. 185.
[12] 102 NLRB 1.
[13] 91 NLRB 635.
[14] 91 NLRB 602.

over whom the Board, by reason of intervening changes of law, would no longer assert its jurisdiction.[15]

In the present case, the Ninth Circuit refused to follow the current rules and decisions of the Board, and, contrary to the *National Gas Co.* decision, granted enforcement based on old rules no longer in effect. The Court below refused petitioner's alternative request that the matter be remanded to the Board for its further consideration of this case in light of its changed policies and standards.

In *Foreman & Clark, Inc. v. National Labor Relations Board,* 9 Cir. 1954, 215 F. 2d 396, petition for certiorari filed in this Court on October 6, 1954, No. 389, the Ninth Circuit again, in conflict with the *National Gas Co.* decision, enforced an order resting on an application of an old rule, subsequently changed by recent decisions of the Board.

In an earlier case, relied on by the Board herein, the Fifth Circuit enforced a Board order despite an intervening change in jurisdictional standards. *National Labor Relations Board v. Red Rock Co.,* 5 Cir. 1951, 187 F. 2d 76, 78. This case was carefully distinguished by the *National Gas Co.* opinion, wherein it was pointed out that the 1950 jurisdictional changes applied only to future cases, whereas the present changes applied to future and *pending* cases.

Thus both the petition herein, No. 329, and *Foreman & Clark v. National Labor Relations Board,* No.

[15] 215 F.2d at 163.

389, concern the refusal of the Ninth Circuit to recognize, in enforcement proceedings, changes in the Board's jurisdictional standards and policies as they apply to subcontractors such as petitioner, and other intervening changes in Board policies and yardsticks. Such refusal directly conflicts with the decision of the Eighth Circuit in the *National Gas Co.* case, the latter being in accord with decisions of this Court.[10]

It is important for this Court to determine this question of federal law, and to resolve this conflict among the several circuits, namely: Whether Courts, in enforcement proceedings, must recognize the new Board law, rules, jurisdictional limitations and yardsticks, promulgated after the particular Board decision, while the matter is *sub judice*.

Until determination by this Court, such a conflict as to the effect of new, intervening Board policies on enforcement of a prior order, will lead to considerable litigation concerning the status of cases. See "New NLRB Yardsticks Prevent Enforcement of Prior Order", C.C.H. Labor Service, 50, 147, par. 50,023; "Applying New NLRB Rules to Pending and Decided Cases", 34 LRR No. 35, Analysis 69-72.

Within the past year the Board has reversed a series of its former holdings and rules. The major importance of such reversals upon pending cases is well illustrated by the above described direct conflict

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[10]For decisions of this Court, see Appendix A-1, *post*. In *Rosenblum v. Federal Trade Commission*, 2 Cir. 1954, 214 F.2d 338, the Commission's change of position as to construction of the statute was held to be grounds for vacating the enforcement decree.

in decision between the Eighth and Ninth Circuits. A decision by this Court settling this question of federal law is of great importance to the administration of the Labor Management Relations Act.

CONCLUSION.

For reasons set forth in the petition herein, and further discussed in this reply brief, we respectfully submit that the petition for certiorari should be granted.

Dated, San Francisco, California,
October 27, 1954.

Respectfully submitted,

ALLAN L. SAPIRO,
DOUGLAS A. NYE,
Counsel for Petitioner.

(Appendix A-1 Follows.)

Appendix A-1

A. Questions of law, practice, procedure, evidence, jurisdiction, etc., are determined according to the law prevailing at the time of the appellate court's decision, and not that in force at the time the judgment appealed from is rendered.

Public Utilities Com. v. United Fuel Gas Co., 317 U.S. 456, 466;

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543;

Carpenter v. Wabash Railway Co., 309 U.S. 23, 27;

Watts, Watts & Co. v. Unione Austriaca Navigazione, 248 U.S. 9, 15;

Gulf, C. & S. F. R. Co. v. Dennis, 224 U.S. 503, 505;

Thompson v. Louisiana, 203 U.S. 131, 135;

New Orleans Flour Inspectors v. Glover, 160 U.S. 170;

Wells v. Green, 159 U.S. 453, 455;

United States v. The Peggy, 1 Cranch 103, 110.

B. In disposing of a case, an appellate court is bound to consider any change, either in fact or in law,

which has supervened since the judgment of the trial court.

Patterson v. Alabama, 294 U.S. 600, 607;*

State Tax Commission v. Van Cott, 306 U.S. 511;*

Landis v. North American Co., 299 U.S. 248, 258, 259;

Ashcraft v. Tennessee, 322 U.S. 143, 156;

Huddleston v. Dwyer, 322 U.S. 232, 236.

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*Remand to the trial Court held proper to enable it to deal appropriately with a change occurring since its judgment and having a bearing upon the right disposition of the case.

FILED
DEC 30 1954
HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A REHEARING OF ORDER ON PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court
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OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
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vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A REHEARING OF ORDER ON PETITION FOR A WRIT OF CERTIORARI.

Your petitioner, Thomas Rigging Company, respectfully prays for a rehearing of the order of this Court dated November 8, 1954, denying the Company's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

BASIC FACTS.

Thomas Rigging Company was a subcontractor twice removed from interstate commerce, performing millwright and rigging services for a contractor engaged in the installation of machinery and equipment at the Rheem plant, San Pablo, California. The Company received approximately $52,000 from the contractor for services rendered (R. 367).

The Board exercised its jurisdiction on two grounds: First, the Company furnished services valued in excess of $50,000 per annum to Rheem, a company producing goods destined for out-of-state shipment valued in excess of $25,000 per annum. *Hollow Tree Lumber Co.* 91 NLRB 635. Second, the Company performed vital services to a company engaged in the production of goods for national defense. *Westport Moving and Storage Co.* 91 NLRB 902 (R. 367). The Court below relied on these two decisions in affirming the Board's jurisdiction over the Company (R. 367). Petitioner's contention that the standards of these two cases were not applicable to subcontractors,[1] was rejected by the Court below (R. 368).

ARGUMENT.

Intervening decisions of the National Labor Relations Board, rendered on October 26, 1954, have expressly overruled the two cases, *Hollow Tree Lumber*

[1]See *Brooks Wood Products* 107 NLRB No. 71; *Casey Welding Works* 107 NLRB No. 185; *Atkinson Electric Co., Inc.* 108 NLRB No. 105.

Co. and *Westport Moving and Storage Co.*, on which the Board and the Court below relied to exercise jurisdiction over petitioner. One of the October 26, 1954 decisions states that under the July 1, 1954 jurisdictional standards, the Board would not have taken jurisdiction over petitioner Thomas Rigging Company.

INTERVENING DECISIONS OF THE BOARD.

Breeding Transfer Co. 110 NLRB No. 64, 35 LRRM 1021, held intrastate links of interstate commerce come within the Board's jurisdiction only if the annual income exceeds $100,000 per year. The dissent cited *N.L.R.B. v. Thomas Rigging Co.* 211 F. 2d 153, the case herein, as authority opposing the Board's current recognition of the contractual relationships between companies. 35 LRRM at 1033, n. 32.

Jonesboro Grain Drying Cooperative 110 NLRB No. 67, 35 LRRM 1038, overruled *Hollow Tree Lumber Co.* 91 NLRB 635, and held that to come within the Board's jurisdiction, an enterprise furnishing goods or services to other enterprises must render services valued at $100,000 or more, 35 LRRM 1040, n. 15.

Maytag Aircraft Corp. 110 NLRB No. 70, 35 LRRM 1056, overruled *Westport Moving and Storage Co.* 91 NLRB 902, 35 LRRM 1056, n. 15. The Board's jurisdiction over enterprises whose operations affect national defense was asserted only if the employer provided goods or services directly related to national

defense, pursuant to government contracts, including subcontracts, of $100,000 or more per year. 35 LRRM 1057.

The dissenting opinion states:

"An even more illuminating example is that to be found in the Thomas Rigging Company case.[16]

"[16]*Thomas Rigging Company*, 102 NLRB 65, enforced, as modified, 211 F. 2d 153 (C.A. 9)." (Emphasis added. 35 LRRM 1059.)

'There the employer was engaged in the installation of $1,500,000 worth of machinery for an 81mm. mortar shell line in an ammunition plant. The Employer received $52,000 for these services *which, of course, had to be performed before the plant could commence production.* This production, incidentally, amounted to more than half a million dollars worth of shells in a 6-month period at a time during the Korean conflict when there was certainly no surplus of ammunition for our troops. A labor dispute arose which involved the employees of the Thomas Company. A panel of *two former Board members and myself asserted jurisdiction under the Westport doctrine,* and issued a decision and order as to the merits of the dispute. The Court of Appeals thereafter specifically affirmed the assertion of jurisdiction on the ground that a 'work stoppage in the Company's project of installing machinery at the [ammunition] plant due to a labor dispute would impede the production of vitally needed defense material.' *Yet if the $100,000 requirement of the majority had been in effect at that time, the Board would not have exerted its efforts to prevent an interruption of the production of hundreds of thousands of dollars of critically needed*

ammunition simply because the Thomas Company had receipts of only $52,000 for its services."

The grounds for the granting of this petition, based on intervening circumstances occurring after the filing of the petition for writ of certiorari, and which have a controlling effect on the case herein, include the following:

1. There is now an important question of federal law which has not been, but should be settled by this Court, namely are the July 1, 1954 changes in jurisdiction policy to be retroactively applied to proceedings pending in the reviewing courts?

By the criteria in the July 1, 1954 standards of jurisdiction, and as explained in the *Jonesboro Grain Drying Cooperative* 35 LRRM 1038 and *Maytag Aircraft Corp.* 35 LRRM 1056, 1059, the activities, operations and $52,000 income of petitioner Thomas Rigging Company would not bring it within the jurisdiction of the Board at the present time. Whether such changes apply to cases pending in the courts, such as the cause herein, is a matter over which the several circuits conflict.

In *National Labor Relations Board v. National Gas Co.* 8 Cir. 215 F. 2d 160, 162, 163, enforcement of the Board's order was denied where the company did not come within the scope of the Board's present jurisdictional requirements.

In *National Labor Relations Board v. Dixie Terminal Co.* 6 Cir., October 21, 1954, 35 LRRM 2059, where the Board's order had been enforced and cer-

tiorari denied by this Court on June 7, 1954, 347 U.S. 1015, the July 1, 1954 jurisdictional changes were held not applicable to an enforcement proceeding. The matter having become final prior to the change, vacation of the decree of enforcement was denied.

Edwin D. Wemyss, d.b.a. Coca-Cola Bottling Company of Stockton 110 NLRB No. 134, November 10, 1954, 35 LRRM 1131. The employer moved to set aside the enforcement decree, since under the new July 1, 1954 standards, the Board would not assert jurisdiction over a soft-drink bottling company operating under a franchise agreement. In a 2-1-1 decision, the Board denied the motion, stating that the new jurisdictional standards would apply to all cases in which a decision and order of the Board had not issued, 35 LRRM 1132.

The dissenting Board member endorsed a policy of not pursuing enforcement remedies against parties over which it would not now assert jurisdiction. It was inconsistent for the Board to proceed with the case simply because it had reached a more advanced stage in the proceedings. 35 LRRM 133, n. 8. See *Coca-Cola Bottling Co. of San Angelo* 110 NLRB No. 106, November 2, 1954, 35 LRRM 1102, the Board refused to assert jurisdiction over franchised soft-drink bottling company under new July 1, 1954 standards.

Both of the foregoing cases, *National Labor Relations Board v. Dixie Terminal Co.* 35 LRRM 2059 and *Edwin D. Wemyss d.b.a. Coca-Cola Bottling Company of Stockton* 35 LRRM 1131, conflict with deci-

sions of this Court as to the effect of subsequent changes on pending cases.

In *Re Disbarment of Isserman* ..... U.S. ....., 99 L.ed 1, this Court granted a motion for rehearing and set aside an order of disbarment. In the original proceeding on April 6, 1953, the vote of this Court resulting in the disbarment, was four justices for disbarment, the Chief Justice and three associate justices dissenting. 345 U.S. 286, 288 et seq. One year later, on April 12, 1954, this Court adopted the current Revised Rules, to be effective July 1, 1954. Rule 8 of the present Rules was amended to permit disbarment only where a majority of the justices participating concurred.

On October 14, 1954, this Court retroactively applied the new Rule 8 to the 1953 proceeding, and set aside the former order of disbarment.

In *National Labor Relations Board v. Pittsburgh S.S. Co.* 340 U.S. 498, 500, this Court held that the law governing the reviewing Court is that in force at the time of the enforcement proceeding, even though the Board's order antedated such law. See *United States v. Hooe* (US) 3 Cranch 73, 79; *Ex parte McCardle* (US) 7 Wall. 506, 514: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

By a 1954 administrative change, this Court restricted its jurisdiction over disbarment proceedings,

and then applied such restriction retroactively to a 1953 proceeding. *Re Disbarment of Isserman* 99 L.ed 1.

The National Labor Relations Board and the reviewing courts should be required to observe the same rule of law in enforcement proceedings where, by administrative change, the Board restricts its jurisdiction over defined economic groups.

Where reason requires a change in the Board's jurisdiction policies, then such change should be applicable to all stages of pending cases, including those in the reviewing Courts. See 29 U.S.C. § 160(e), re review procedures. Where the reason for a rule ceased, the rule also ceased, *Funk v. United States* 290 U.S. 371, 384. The reason for the Board's exercise of jurisdiction over petitioner Thomas Rigging Company was the rule expressed in the *Hollow Tree Lumber Co.* and *Westport Moving and Storage Co.* cases. By the intervening cases, and the July 1, 1954 standards, these two cases have been overruled.

Under the decisions of this Court that questions of law, procedure, jurisdiction, etc., are determined according to the law prevailing at the time of the Appellate Court's decision, and not that in force at the time the judgment appealed from is rendered, all current cases, whether pending before the Board or the reviewing Courts, should be governed by the jurisdictional changes and current decisions of the Board. See *Public Utilities Com. v. United Fuel Gas Co.* 317 U.S. 456, 466; *Vandenbark v. Owens-Illinois Glass Co.* 311 U.S. 538, 541; *United States v. The Peggy* 1 Cranch 103, 110; *Dinsmore v. Southern Exp. Co.* 183 U.S. 115, 120.

2. Should the Court order requiring action by and restraining acts of petitioner Thomas Rigging Company be enforced in the future, when the Board now disclaims jurisdiction over employers in identical operations and circumstances as those of petitioner?

An order of the Board which would operate *in futuro* in a manner contrary to intervening statutory or policy changes should be set aside. *National Labor Relations Board v. L. A. Young Spring & Wire Corp.* D.C. Cir., 163 F. 2d 905, 907; *National Labor Relations Board v. Wyandotte Transportation Company* 6 Cir., 166 F. 2d 434; *National Labor Relations Board v. Budd Mfg. Co.* 6 Cir., 169 F. 2d 571.

The order and decree of the Court below requires Thomas Rigging Company to perform certain acts, and to cease and desist from other acts (R. 373 et seq.). As shown by the intervening decisions, the Board would not take jurisdiction or issue an order if the facts of the instant case were now before it. By enforcing the decree against petitioner, and at the same time having jurisdictional standards not applicable to those in petitioner's category, results in the Board permitting other such employers to be free to engage in conduct from which petitioner would be enjoined. It is for this additional reason that petitioner prays this Court to grant this petition for rehearing, filed herein because of the intervening circumstances of controlling effect.

CONCLUSION.

For the foregoing reasons, petitioner Thomas Rigging Company respectfully prays that the order of this Court denying its petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit be reheard and vacated and that the petition be granted.

Dated, San Francisco, California,
December 29, 1954.

Respectfully submitted,
ALLAN L. SAPIRO,
DOUGLAS A. NYE,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned, Allan L. Sapiro, one of the attorneys for Petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 as amended, and that said petition for rehearing is not interposed for delay.

Dated, San Francisco, California,
December 29, 1954.

ALLAN L. SAPIRO,
Counsel for Petitioner.